

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

DON ANDERSON

(b) County of Residence of First Listed Plaintiff NIAGARA

(EXCEPT IN U.S. PLAINTIFF CASES)

KRESSES-PIASECKI LEGAL
908 Niagara Falls Blvd. Suite 252

(c) Attorney's Firm Name, Address, and Telephone Number
North Tonawanda, New York 14120
(716) 693-4792

BRANDON W. PIASECKI, ESQ.

DEFENDANTS

WILSON FARMS, INC.

County of Residence of First Listed Defendant ERIE

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

☐ 1 U.S. Government Plaintiff☒ 3 Federal Question
(U.S. Government Not a Party)☐ 2 U.S. Government Defendant☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State

PTF DEF
☐ 1 ☐ 1

Incorporated or Principal Place of Business In This State

PTF DEF
☐ 4 ☐ 4

Citizen of Another State

☐ 2 ☐ 2

Incorporated and Principal Place of Business In Another State

☐ 5 ☐ 5

Citizen or Subject of a Foreign Country

☐ 3 ☐ 3

Foreign Nation

☐ 6 ☐ 6

IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) SOCIAL SECURITY <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 USC 1963 ET. SEQ Violations of Electronic Funds Transfer Act

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23DEMAND \$
Statutory Damages

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of New York

DON ANDERSON

Plaintiff

v.

WILSON FARMS, INC.

Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

WILSON FARMS, INC. 1780 Wehrle Drive, Suite 110,
Williamsville, New York 14221

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,

whose name and address are:

BRANDON W. PIASECKI
KRESSES & PIASECKI LEGAL
908 NIAGARA FALLS BLVD. SUITE 252
NORTH TONAWANDA, NEW YORK 14120

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

LAW OFFICES OF KRESSES-PIASECKI
LEGAL
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Attorney for Plaintiff DON ANDERSON

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

DON ANDERSON, individually and
on behalf of all others similarly
situated,

Plaintiff,

vs.

WILSON FARMS, INC.,

Defendant.

Case No.

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

Now comes DON ANDERSON ("Plaintiff"), on behalf of himself and all
others similarly situated and alleges as follows:

INTRODUCTION

1. Plaintiff brings this action individually and on behalf of all others
similarly situated against Defendant WILSON FARMS, INC. alleging violations of
the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* and its implementing
regulations 12 C.F.R. § 205 *et seq.* (hereinafter referred to collectively as the
"EFTA").

2. The Congressional findings and declaration of purpose regarding the
EFTA are as follows:

(a) Rights and liabilities undefined

The Congress finds that the use of electronic systems to transfer funds provides the potential for substantial benefits to consumers. However, due to the unique characteristics of such systems, the application of existing consumer protection legislation is unclear, leaving the rights and liabilities of consumers, financial institutions and intermediaries in electronic fund transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. The primary objective of this subchapter, however, is the provision of individual consumer rights.

15 U.S.C. § 1693.

3. Among other things, the EFTA imposes certain disclosure requirements upon operators of automated teller machines ("ATMs").

4. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes fees on consumers in connection with electronic fund transfers to provide notice of the fact that the fee is being imposed and the amount of the fee.¹

5. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required notice must be posted as follows:

(B) Notice requirements

(i) On the machine

The notice required under clause (i) of subparagraph (A) with respect to any fee described in such paragraph shall be posted in a prominent and conspicuous location on or at the automated teller machine at which the electronic fund transfer is initiated by the consumer.

(ii) On the screen

The notice required under clauses (i) and (ii) subparagraph (A) with respect to any fee described in such subparagraph shall appear on the

¹ "Electronic fund transfer" is defined as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or withdrawals of funds, and transfers initiated by telephone...." 15 U.S.C. § 1693a(6).

1 screen of the automated teller machine, or on a paper notice issued
2 form such machine, after the transaction is initiated and before the
consumer is irrevocably committed to completing the transaction....

3 6. The relevant implementing regulation, 12 C.F.R. § 205.16(c)
4 reinforces EFTA's statutory posting requirement, mandating that the mandatory fee
5 notice: 1) be posted in a "prominent and conspicuous location" on or at the ATM
6 machine; and 2) "on the screen of the automated teller machine or by providing it
7 on paper, before the consumer is committed to paying the fee." 12 C.F.R. §
8 205.16(c)(1) and (2).

9 7. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12
10 C.F.R. 205.16(e), prohibit ATM operators from imposing a fee on a consumer
11 unless EFTA's notice and posting requirements are followed by the ATM operator.

12 8. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

13 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
14 consumer

15 No fee may be imposed by any automated teller machine operator in
16 connection with any electronic fund transfer initiated by a consumer
for which a notice is required under subparagraph (A), unless—

17 (i) The consumer receives such notice in accordance with subparagraph
18 (B)...

19 9. In connection with the 2006 amendments to the EFTA, the board of
20 governors of the Federal Reserve published its final rule and official staff
21 interpretation which, *inter alia*, explained the EFTA's disclosure requirements as
22 follows:

23 The final rule clarifies the two-part disclosure scheme established in Section
24 904(d)(3)(B) of the EFTA. The first disclosure, on ATM signage posted on
25 or at the ATM, allows consumers to identify quickly ATMs that generally
26 charge a fee for use. This disclosure is not intended to provide a complete
27 disclosure of the fees associated with the particular type of transaction the
28 consumer seeks to conduct. Until a consumer uses his or her card at an
ATM, the ATM operator does not know whether a surcharge will be imposed
for that particular consumer. Rather it is the second, more specific
disclosure, made either on the ATM screen or on an ATM receipt, that

1 informs the consumer before he or she is committed to the transaction
2 whether, in fact, a fee will be imposed for the transaction and the amount of
3 the fee...

4 71 F.R. 1638, 1656.

5 10. The EFTA imposes strict liability upon ATM operators which fail to
6 comply with its disclosure requirements. *See e.g., Flores v. Diamond Bank*, 2008
7 WL 4861511 (N.D. Ill., Nov. 7, 2008). *Cf. Bisbey v. D.C. National Bank*, 793 F.2d
8 315, 318-19 (D.C. Cir. 1986). ("Among the protections afforded to consumers is
9 the right to receive notice from the ATM operator of the existence and amount of
10 any fee that operator might impose on consumers for conducting transactions at the
11 ATM. 15 U.S.C. § 1693b(d)(3). This requires the ATM operator to place notice
12 both on the machine itself and upon the ATM screen. 15 U.S.C.
13 §1693b(d)(3)(B)"). A plaintiff seeking statutory damages under the EFTA need not
14 prove that he or she has sustained any actual financial loss, or that he or she relied
15 upon the lack of mandatory disclosure as an inducement to enter the transaction.
16 *See Burns v. First American Bank*, 2006 WL 3754820 *6 (N. D. Ill., Dec. 19, 2006)
17 ("Section 1693b(d)(3) prohibits an ATM operator from charging a fee unless it
18 provides notice of its fee on the machine and on the screen, period, no mention of a
19 necessary scienter.")

25 JURISDICTION AND VENUE

26 11. This Court has federal question jurisdiction pursuant to 28 U.S.C. §
27 1331 and 15 U.S.C. § 1693 *et. seq.*
28

12. Plaintiff's claims asserted herein arose in this judicial district and Defendant does substantial business in this judicial district and/or is the operator of ATMs in this judicial district.

13. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and (c) and 1400(a) in that this is the judicial district in which a substantial part of the acts and omissions giving rise to the claims occurred.

PARTIES

14. Plaintiff, Don Anderson, is and at all times relevant hereto was a resident of the state of New York.

15. Defendant, Wilson Farms, Inc. is headquartered at 1780 Wehrle Drive, Ste 110, Williamsville, NY 14221.

16. Defendant is an automated teller machine operator, as that term is defined by 12 C.F.R. § 205.16(a) which states: "Automated teller machine operator means any person that operates an automated teller machine at which a consumer initiates an electronic fund transfer or a balance inquiry and that does not hold the account to or from which the transfer is made, or about which the inquiry is made."

FACTS RELATED TO PLAINTIFF'S TRANSACTION

17. Specifically, Plaintiff made a cash withdrawal from Defendant's ATM at the following locations:

(a) On or about October 17, 2012, Plaintiff made an electronic fund transfer at Defendant's ATM located at 8109 N.F.B., Niagara Falls, NY. Defendant charged Plaintiff a fee of \$2.50 in connection with the above-described transaction.

(b) On or about October 22, 2012, Plaintiff made an electronic fund transfer at Defendant's ATM located at 95 S. Transit & High, Lockport, NY. Defendant charged Plaintiff a fee of \$2.50 in connection with the above-described transaction.

1 (c) On or about September 26, 2012, Plaintiff made an electronic
2 fund transfer at Defendant's ATM located at 2310 Hyde Park
3 Blvd., Niagara Falls, NY. Defendant charged Plaintiff a fee of
4 \$2.50 in connection with the above-described transaction.

5 (d) On or about November 11, 2012, Plaintiff made an electronic
6 fund transfer at Defendant's ATM located at 607 N. Union
7 Street, Olean, New York. Defendant charged Plaintiff a fee of
8 \$2.50 in connection with the above-described transaction

9 18. At the time of the above-described electronic transaction, Plaintiff did
10 not maintain any accounts with Defendant.

11 19. At the time of the above-described transaction, Defendant was acting
12 as an "automated teller machine operator" that operated the automated teller
13 machine at which Plaintiff initiated an electronic fund transfer or a balance inquiry.

14 20. However, at the time of the above-described transaction, there was no
15 notice posted "on or at" the ATM operated by Defendant apprising consumers that
16 a fee would be charged for use of the ATM.

17 21. Because Defendant did not post the required notice, it was not
18 permitted to charge a usage fee to Plaintiff and other class members.

19 CLASS ACTION ALLEGATIONS

20 22. Plaintiff brings this class action on behalf of himself and all other
21 similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil
22 Procedure.

23 23. Plaintiff seeks to represent a class of persons to be defined as follows:

24 All persons who during the year preceding the filing of Plaintiff's
25 complaint: 1) where charged a "terminal fee" at the subject ATMs
26 located at 8109 N.F.B., Niagara Falls, NY, 95 S. Transit & High,
27 Lockport, NY, 2310 Hyde Park Blvd., Niagara Falls, NY and 607 N.
28 Union Street, Olean, New York operated by Defendant when such
persons made an electronic fund transfer and/or balance inquiry
where, 2) no notice indicating that such fee was to be charged was
posted on or at the outside of the ATM machine.

24. Congress expressly intended that the EFTA would be enforced, in part,
through private class actions. 15 U.S.C. § 1693m(a).

25. The EFTA's class action enforcement provisions are identical, in relevant part, to the class action enforcement provisions of other consumer protection statutes and housed within the Consumer Credit Protection Act. (15 U.S.C. § 1692 *et seq.*) There is abundant authority interpreting and applying these statutory class action provisions, throughout the federal judiciary. Federal courts have routinely certified classes relating to consumer claims for statutory damages, generally, and for violation of the EFTA's ATM fee disclosure provisions, specifically. *See, e.g., Hammer v. JP's Southwestern Foods, LLC*, No. 08-cv-0339 (W.D. Mo.)(Gaitan, J.); *Flores, supra* 2008 WL 4861511 at 3-5; *Burns, supra.*, 2006 WL 3754820 at *11-12; *Jackman v. Global Cash Access Holdings*, 09-cv-897 (W.D. Pa.)(McVerry, J.)(class certified and final settlement approval granted); *Nolf v. Allegheny Bank of Pittsburgh*, 09-cv-645 (W.D.Pa.)(Bissoon, J.)(class certified and final settlement approval granted); *Dragotta v. Northwest Bancorp, Inc. d/b/a Northwest Savings Bank*, 09-cv-632 (W.D. Pa.)(Fischer, J. .)(class certified and final settlement approval granted); *Parker v. First-Citizen Bank & Trust Company*, 09-cv-0588 (M.D. Tenn.)(Campbell, J. .)(class certified and final settlement approval granted); *Polevoy v. Devon Bank*, 08-cv-4822 (N.D. Ill.)(Kennelly, J.) (class certified and final settlement approval granted); *Ochart v. Broadway Bank*, 08-cv-4893, (N.D. Ill.)(Castillo, J.)(class certified and final settlement approval granted); *Anthony v. Fifth Third Bank (Chicago)*, 08-cv-4359, (N.D. Ill.)(Schenkier, J.)(class certified and final settlement approval granted); *Zintel v. Financial Partners Credit Union*, (C.D. CA), SACV 09-0868. (class certified and final settlement approval granted).

26. Numerosity: The class described above is so numerous that joinder of all individual members in one action would be impracticable. The disposition of the individual claims of the respective class members through this class action will benefit both the parties and this Court.

1 27. Plaintiff is informed and believes, and thereon alleges, that there are at
2 minimum, thousands of members of the class described above.

3 28. The exact size of the class and the identities of the individual members
4 thereof are ascertainable through Defendant's records.

5 29. Members of the class may be notified of the pendency of this action by
6 techniques and forms commonly used in class actions, such as by published notice,
7 e-mail notice, website notices, first class mail, or combinations thereof, or by other
8 methods suitable to this class and deemed necessary and/or appropriate by this
9 Court.

10 30. Typicality: Plaintiff's claims are typical of the claims of the members
11 of the class. The claims of the Plaintiff and members of the class are based on the
12 same legal theories and arise from the same unlawful and willful conduct.

13 31. Plaintiff and members of the class were each consumers who used an
14 ATM machine operated by Defendant to make an electronic fund transfer or
15 balance inquiry and were charged a terminal owner fee, notwithstanding that the
16 posting providing notice of the fee required by EFTA "on or at" Defendant's
17 terminals was not present.

18 32. Common Questions of Fact and Law: There is a well-defined
19 community of interest and common questions of fact and law affecting members of
20 the class.

21 33. The questions of fact and law common to the class predominate over
22 questions which may affect individual members and include the following:

- 23 a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R.
24 205.16, Defendant was, at all relevant times, an automated teller
25 machine operator that imposed a fee on consumers for providing
26 host electronic fund transfer services to those consumers;
27 b. Whether Defendant complied with the notice requirements of 15
28 U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,
29 c. Whether Plaintiff and members of the class are entitled to
30 statutory damages, costs and/or attorneys' fees for Defendant's
31 acts and conduct.

35. Superiority: A class action is superior to other available means for the fair and efficient adjudication of the claims of the class. While the aggregate damages which may be awarded to the members of the class are likely to be substantial, the damages suffered by the individual members of the class are relatively small. As a result, the expense and burden of individual litigation makes it economically infeasible and procedurally impracticable for each member of the class to individually seek redress for the wrongs done to them. Plaintiff does not know of any other litigation concerning this controversy already commenced by or against any member of the class. The likelihood of the individual members of the class prosecuting separate claims is remote. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments, and would increase the delay and expense to all parties and the court system resulting from multiple trials of the same factual issues. In contrast, the conduct of this matter as a class action presents fewer management difficulties, conserves the resources of the parties and the court system, and would protect the rights of each member of the class. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

36. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to imposition of a usage fee upon a consumer for host transfer services, an automated teller machine operator must provide notice to the consumer consistent with subparagraph (B) of that statutory section.

1 37. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

2 (B) Notice requirements

3 (iii) On the machine

4 The notice required under clause (i) of subparagraph (A) with respect
5 to any fee described in such subparagraph shall be posted in a
6 prominent and conspicuous location on or at the automated teller
machine at which the electronic fund transfer is initiated by the
consumer.

7 38. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant
8 part:

9 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
10 consumer

11 No fee may be imposed by any automated teller machine operator in
12 connection with any electronic fund transfer initiated by a consumer
for which a notice is required under subparagraph (A), unless—

13 (i) The consumer receives such notice in accordance with subparagraph

14 (B)...

15 39. EFTA's statutory notice requirements are reinforced by the
16 implementing regulations set forth at 12 C.F.R. § 205.16.

17 40. Defendant violated the notice requirements of EFTA in connection
18 with providing host transfer services to Plaintiff and the Class.

19 41. Defendant was prohibited from imposing any usage fee or similar fee
20 for providing host transfer services because it failed to comply with EFTA's notice
21 requirements.

22 42. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff
23 and Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*,
24 statutory damages to be determined by the Court, the costs of this action and
25 reasonable attorneys' fees.

26 43. On November 27, 2009, the Federal Deposit Insurance Corporation
27 ("FDIC")- a major regulator of many banks—issued Financial Institution Letter 66-
28 2009 reiterating the fact that the EFTA requires ATM operators to post ATM fee

1 notices both (a) in a prominent and conspicuous location on or at the automated
2 teller machine, and (b) on the screen or on paper before the consumer is committed
3 to paying the fee. The letter also noted that the FDIC had first notified FDIC-
4 supervised banks of these requirements in a Financial Institution Letter dated March
5 23, 2001 (FIL-25-2001).

6 44. By way of this action, Plaintiff seeks the imposition of statutory
7 damages, costs of suit and attorneys' fees.

8
9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff, on behalf of himself and the members of the class,
11 prays for:

- 12 a. An order certifying the class and appointing Plaintiff as the
13 representative of the class, and appointing counsel for Plaintiff
14 as counsel for the class;
15 b. An award to Plaintiff and the members of the class of statutory
16 damages;
17 c. Payment of costs of suit; and,
18 d. Payment of reasonably attorneys' fees.

19 **A TRIAL BY JURY IS DEMANDED.**

20 Dated: November 21, 2012

Respectfully submitted,

21 LAW OFFICES OF KRESSES-PIASECKI
LEGAL

22 By: 

BRANDON PIASECKI

23 Law offices of KRESSES-PIASECKI
LEGAL

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27 Attorney for Plaintiff
28 DON ANDERSON